

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CITY OF BAYONNE, NEW JERSEY)	File No. 0003074060
)	
Request For Waiver Pursuant to Section 337(c) of)	
the Communications Act of 1934, as Amended, to)	
Allow Public Safety Communications on)	
Frequencies Allocated Under Part 22 of the)	
Commission's Rules)	

ORDER

Adopted: June 20, 2011**Released: June 21, 2011**

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The City of Bayonne, New Jersey (Bayonne, or the City), filed an application and request for waiver¹ to use, for public safety purposes, two frequencies offset between channels allocated under Part 22 of the Commission's rules.² Specifically, Bayonne seeks to modify its existing public safety communications system by adding frequencies 470.1500 and 473.1500 MHz. Bayonne seeks waiver relief pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act),³ of Sections 20.9(a)(6), 22.621, and 22.651 of the Commission's rules, to use these frequencies for public safety purposes.⁴ In the alternative, the City seeks a waiver pursuant to Section 1.925 of the Commission's rules.⁵ By this Order, we grant Bayonne's Waiver Request under Section 1.925.

II. BACKGROUND

2. Bayonne is located in the New York City-Northeastern New Jersey metropolitan area.⁶ In 2004, the Wireless Telecommunications Bureau's former Public Safety and Critical Infrastructure

¹ See File No. 0003074060 (as amended, modified, or augmented on July 2, 2007, Sept. 25, 2007, Oct 26, 2007, Feb. 5, 2009, April 2, 2009, April 3, 2009, Sept. 10, 2009, and Oct. 5, 2009) and associated attachments "Request for Waiver" filed June 18, 2007, as revised Oct. 24, 2007 (Waiver Request).

² 47 C.F.R. Part 22.

³ 47 U.S.C. § 337(c).

⁴ 47 C.F.R. §§ 20.9(a)(6), 22.621, and 22.651.

⁵ See Waiver Request at 1; 47 C.F.R. § 1.925. Additionally, on our own motion under Sections 1.3 and 1.925(a) of the Commission's rules, we consider waiver relief of Section 22.623(b). 47 C.F.R. §§ 1.3, 1.925(a), 22.623(b).

⁶ Waiver Request at 2.

Division (WTB/PSCID)⁷ granted a waiver authorizing Bayonne to operate a public safety radio system under call sign WQBL378 on unassigned frequencies allocated for non-public safety use.⁸

3. Bayonne now seeks waiver of Sections 20.9(a)(6), 22.621, and 22.651 to add non-public safety frequencies 470.1500 MHz and 473.1500 MHz to its existing public safety radio system.⁹ Bayonne states that the frequencies are “compatible with its current channel allocations for the purpose of expanding the communications capability of its city-wide public safety communications system” and would provide “direct, on-scene, low power communications capability for fire operations and low power surveillance capabilities for the police department.”¹⁰ Bayonne further avers that no public safety frequencies are available or suitable for its radio system, and that its proposed use of the two frequencies would not result in harmful interference to or from other licensees.¹¹ Bayonne’s frequency coordinator states that they have “conducted extensive searches in the VHF, UHF, TBand, and 800 MHz bands” and “determined that there are no available part 90 frequencies.”¹²

4. *Public Notice.* The Commission’s Public Safety and Homeland Security Bureau placed Bayonne’s application and waiver request on public notice on April 3, 2008.¹³ Only the Association of Public Safety Communication Officials (APCO)¹⁴ and the County of Bergen, New Jersey (Bergen)¹⁵ commented on the record. APCO’s comments, while not specific to this proceeding, argue that “the Commission’s consideration of waiver requests must recognize that public safety agencies often have specific requirements for radio frequencies in their current spectrum bands that justify waivers of the Commission’s rules, notwithstanding the potential availability in the new 700 MHz band.”¹⁶

⁷ Pursuant to a Commission reorganization effective September 25, 2006, the relevant duties of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunication Bureau were assumed by the Public Safety and Homeland Security Bureau’s Policy Division, which the Commission subsequently renamed the Policy and Licensing Division. *See* Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006); Reorganization of the Public Safety and Homeland Security Bureau, *Order*, FCC 11-18 (rel. Apr. 14, 2011).

⁸ Waiver Request at 2; *see* Seven Public Safety Agencies in the New York Metropolitan Area, *Order*, 19 FCC Rcd 15355 (WTB PSCID 2004) (*Seven Public Safety Agencies Order*).

⁹ Waiver Request at 1. *See* 47 C.F.R. § 20.9(a)(6), which states that Part 22 paging and radiotelephone services shall be treated common carriage services and regulated as commercial mobile radio service. Frequency 470.1500 MHz is offset between existing Part 22 point-to-multipoint frequencies 470.1375 and 470.1625 MHz. *See* 47 C.F.R. § 22.621. Frequency 473.1500 MHz is offset between existing Part 22 trunked mobile frequencies 473.1375 and 473.1625 MHz. *See* 47 C.F.R. § 22.651.

¹⁰ Waiver Request at 4.

¹¹ *See id.* at 7-8.

¹² *See* Letter from Lieutenant Anthony Melia, APCO New Jersey Frequency Advisor, to Federal Communications Commission (dated Sept. 21, 2007) (APCO Letter).

¹³ Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver by the City of Bayonne, New Jersey to Add Two Part 22 Frequencies to its Public Safety Radio System, *Public Notice*, 23 FCC Rcd 5636 (PSHSB 2008).

¹⁴ Comments of APCO, filed April 21, 2008 (APCO Comments).

¹⁵ Letter from Mark K. Lepinski, Lieutenant, Communications Director, Bergen County Police Department, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed May 5, 2008 (Bergen Letter).

¹⁶ APCO Comments at 3.

5. Bergen operates on adjacent frequencies 470.1625 and 473.1625 MHz, and originally expressed concern in its comments that Bayonne's proposed operation "presents the question of interference to adjacent channel operations in the southern part of Bergen County."¹⁷ Further, Bergen noted that Bayonne did not present a technical analysis regarding potential harmful interference resulting from its proposed radio system, and failed to "indicate why the Commission's allocation of 14 UHF channels for low power purposes, Section 90.20(d)(84) and Section 90.267, would not meet its requirement."¹⁸ However, on December 19, 2008, Bergen withdrew its opposition to Bayonne's waiver request based on Bergen's December 18, 2008 authorization to use frequencies 470.1625 and 473.1625 MHz with narrow bandwidth under call sign WPZH865.¹⁹

6. On April 2, 2009, Bayonne amended its application to request a new base station on frequency 470.1500 MHz with increased power and antenna height compared to its prior proposal.²⁰ This filing elevated the potential of interference to existing licensees. On September 10 and October 5, 2009, Bayonne provided supplemental technical analyses to demonstrate that its proposed operations would not cause harmful interference to incumbent public safety licensees that are also operating on Part 22 frequencies based on previous waivers.²¹

III. DISCUSSION

7. Section 337(c) of the Act provides that the Commission "shall waive . . . its regulations implementing th[e] Act (other than its regulations regarding harmful interference) to the extent necessary to permit" entities "seeking to provide public safety services" to use unassigned spectrum not allocated to public safety if the Commission makes five specific findings: (i) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use; (ii) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations; (iii) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made; (iv) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and (v) granting such application is consistent with the public interest.²²

¹⁷ Bergen Letter at 2.

¹⁸ *Id.*

¹⁹ See File No. 0003074060, attached Letter from John E. Logan, Special Counsel to County of Bergen, to Federal Communications Commission (dated Dec. 19, 2008) (Bergen Withdrawal of Opposition). Bergen states, "the narrowband format will alleviate the concern we had expressed with regard to Bayonne's proposed use as these frequencies were previously used in a conventional wideband mode." *Id.* at 1. Even though Bergen has a narrowband license on frequencies 470.1625 and 473.1625 MHz, Bergen's wideband license on these frequencies is still active in the Commission's Universal Licensing System database as of the release date of this Order.

²⁰ See File No. 0003074060, attached "Request to Modify Pending Application," filed April 3, 2009.

²¹ See File No. 0003074060, attached Letter from Thomas H. Shuler, Consultant to the City of Bayonne, NJ, to Federal Communications Commission (dated Sept. 10, 2009) (Shuler September Letter), and Letter from Thomas H. Shuler, Consultant to the City of Bayonne, NJ, to Federal Communications Commission (dated Oct. 5, 2009) (Shuler October Letter).

²² 47 U.S.C. § 337(c).

8. When considering waiver requests filed pursuant to Section 337(c) of the Act, we must first determine whether the applicant is an “entity seeking to provide public safety services.”²³ The Act defines public safety services as “services – (A) the sole or principle purpose of which is to protect the safety of life, health, or property; (B) that are provided – (i) by State or local government entities; or (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.”²⁴ The *Seven Public Safety Agencies Order* established that Bayonne is a public safety entity that provides public safety services, and no intervening circumstances since that time alter our conclusion.²⁵

9. Next, we consider whether Bayonne’s petition satisfies the specific showing requirements mandated by Section 337(c) of the Act. We note that an applicant’s failure to meet any one of the five criteria constitutes sufficient cause for the Commission to deny a request for waiver under Section 337(c).²⁶

10. Initially, we consider whether “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” pursuant to subsection 337(c)(1)(A).²⁷ With regard to this prong, Bayonne states that it “has conducted a thorough examination of Public Safety Pool channels, and has determined that there are no channels ‘immediately available’ to satisfy its requested public safety service use.”²⁸ Bayonne’s consultant “researched the compatible UHF spectrum, concluding that no channels are available for Bayonne’s requested use.”²⁹ Bayonne states that “[n]o other frequency band is compatible with the frequencies the Commission has already allocated to Bayonne in the reference proceeding.”³⁰ Bayonne also attached “a letter from the APCO local frequency advisor confirming the lack of any other channels to meet Bayonne’s requirements,” which cites the VHF, UHF, T Band, and 800 MHz.³¹

11. Based on our review of the record, we find that Bayonne has not demonstrated that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public

²³ See 47 U.S.C. § 337(f).

²⁴ *Id.*

²⁵ See *Seven Public Safety Agencies Order*, 19 FCC Rcd at 15361 ¶ 12.

²⁶ See *South Bay Regional Public Communications Authority, Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998) (*South Bay*); *Township of Cinnaminson, New Jersey, Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (PSHSB 2007) (*Cinnaminson*), citing *University of Southern California, Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (WTB PSPWD 2001). See also *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended*, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000) (footnotes omitted) (*Section 337 Report and Order*).

²⁷ 47 U.S.C. § 337(c)(1)(A).

²⁸ Waiver Request at 7.

²⁹ *Id.* See also File No. 0003074060, attached “Analysis of Frequency Availability, Vicinity – City of Bayonne, NJ” dated April 18, 2007.

³⁰ Waiver Request at 7.

³¹ *Id.* See also APCO Letter.

safety service use,” pursuant to subsection 337(c)(1)(A).³² A previous finding of insufficient public safety channel availability in an area, while relevant, does not address changes in the spectrum landscape over time that must be considered. While it may have been reasonable for Bayonne to exclude the availability of the 700 MHz band from its initial analysis, we must consider its application in light of recent developments. Since Bayonne first filed its application in 2007, broadcasters have vacated the 700 MHz band as a result of the June 12, 2009 DTV transition. In addition, the Bureau recently approved the Region 8 (New York Metropolitan Area) 700 MHz Regional Plan.³³ Accordingly, Section 337 compels us to consider the 700 MHz public safety channels to be immediately available and ready for assignment.³⁴

12. It is insufficient that an applicant only show the unavailability of frequencies in its preferred public safety band or the unsuitability of frequencies in other public safety bands.³⁵ Thus, because Bayonne has not shown the unavailability of 700 MHz public safety frequencies by way of amendment to its pending application, we find that it has not satisfied subsection 337(c)(1)(A). Having made this finding, we need not address its arguments regarding the remaining four criteria.³⁶ Thus, we find that Bayonne does not satisfy the first criterion of Section 337(c), and therefore Bayonne cannot obtain waiver relief pursuant to Section 337.

13. However, our finding that Bayonne does not warrant waiver relief pursuant to Section 337 of the Act does not foreclose our consideration of Bayonne’s alternative request for waiver relief

³² 47 U.S.C. § 337(c)(1)(A).

³³ See Public Safety and Homeland Security Bureau Approves Region 8 (New York Metropolitan Area) 700 MHz Regional Plan, PS Docket No. 06-229, WT Docket No. 02-378, 24 FCC Rcd 5317 (PSHSB 2009).

³⁴ We have considered 700 MHz band narrowband frequencies to be “available” to a particular public safety applicant if the Commission has approved the associated 700 MHz regional plan; the applicant could protect TV stations pursuant to Section 90.545 of the Commission’s rules, 47 C.F.R. § 90.545; and the frequencies are not already assigned to another public safety entity. Before and during the DTV transition, in most urban areas, there were TV stations that blocked public safety use of the 700 MHz band. The DTV transition cleared all full power TV stations out of the 700 MHz band, meaning Section 90.545 protection generally is no longer an issue. Thus, as of June 12, 2009, we have considered 700 MHz band narrowband frequencies to be “available” in a given region upon Commission approval of the associated regional plan. The Commission’s online 700 MHz Regional Planning Interactive Map shows the status of each regional plan. See <http://publicsafety.fcc.gov/pshs/public-safety-spectrum/700-MHz/rpc-map.htm>.

³⁵ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (*Balanced Budget Act Report and Order*) (footnotes omitted); see also H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 579-80 (1997) (“spectrum must not be immediately available on a frequency already allocated to public safety services.”); County of Marin, California, *Order*, 22 FCC Rcd 9165, 9167-68 ¶ 6 (PSHSB PD 2007); State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 446-47 ¶ 15 (WTB PSPWD 2002); State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000).

³⁶ See, e.g., Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999) (having noted failure of Hennepin County to meet one of the criteria, the Wireless Telecommunications Bureau did not address remainder); New Hampshire Department of Transportation (NHDOT), *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 (WTB 1999) (after having determined that New Hampshire failed to demonstrate that no other spectrum allocated to public safety service was immediately available, the Wireless Telecommunications Bureau noted that it “need not address whether NHDOT has submitted evidence that would allow us to make the other findings required by Section 337(c)(1) of the Act.”).

pursuant to Section 1.925 of the Commission's rules.³⁷ Section 1.925 provides the Commission the necessary flexibility to achieve its statutory objective of safeguarding life and property by considering an applicant's request for waiver relief according to the standards that an applicant must meet under the rule.³⁸ From our review of the record in this case, we find that Bayonne has presented sufficient information for us to consider whether waiver relief is justified under Section 1.925.

14. Section 1.925 states that to obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the requested waiver would be in the public interest;³⁹ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁴⁰ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁴¹ Based on the information before us, we conclude that a grant of Bayonne's waiver request is warranted under the first prong of the waiver standard. We proceed with analyses of each rule for which Bayonne requests or requires waiver.

15. *Sections 22.621 and 22.651.* We begin our analysis by examining whether the waiver would undermine the purpose of the rules sought to be waived. The underlying purpose of Section 22.621 is to reserve certain frequencies "for assignment to transmitters utilized within point-to-multipoint systems that support transmitters that provide public mobile service."⁴² The underlying purpose of Section 22.651 is to reserve certain frequencies "for assignment to transmitters providing trunked public mobile service" in certain urbanized areas.⁴³ Accordingly, we evaluate the Part 22 licensing landscape in the New York City metropolitan area. There are no Part 22 entities licensed on the offset frequencies sought by Bayonne or on the upper and lower adjacent main channels listed in the Part 22 rules. Further, due to the presence of several incumbent public safety licensees who obtained authorizations by prior waivers, as described in the next paragraphs, no Part 22 entities could be licensed on any of these frequencies in the New York City urbanized area. Based on the foregoing analysis, we find that the underlying purposes of Sections 22.621 and 22.651 would not be served or would be frustrated by application to the present case.

16. *Co-channel and adjacent channel licensees.* While the Commission's Part 22 rules do not require a showing of interference protection for incumbent public safety licensees operating on Part

³⁷ See County of Ocean, New Jersey, Order, 24 FCC Rcd 11299, 11305 ¶ 16 (PSHSB PD 2009); *Balanced Budget Act Report and Order* at 22769 ¶ 132 n.366, citing 47 C.F.R. § 1.925. See also Letter to Alan S. Tilles, Esq., 22 FCC Rcd 13577, 13581 & n.30 (WTB MD 2007) (noting that "[i]n addition to the Section 337 process, [public safety] entities can also seek a conventional waiver under Section 1.925 of rules.>").

³⁸ See 47 C.F.R. 1.925 (providing that "[t]he Commission *may* waive specific requirements of the rules upon its own motion or upon request") (emphasis added). See 47 C.F.R. § 1.925(b)(3)(i)-(ii) (setting forth the criteria).

³⁹ See 47 C.F.R. § 1.925(b)(3)(i).

⁴⁰ See 47 C.F.R. § 1.925(b)(3)(ii).

⁴¹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

⁴² 47 C.F.R. § 22.621.

⁴³ 47 C.F.R. § 22.651.

22 spectrum by waiver, we have the discretion to apply land mobile interference protection criteria.⁴⁴ We exercise this discretion to elaborate on our statement above that the frequencies are already assigned to public safety entities as a result of prior waivers, and also to fulfill our due diligence to examine whether Bayonne would cause harmful interference to these public safety entities or any other entities.

17. A search of the Commission's licensing database indicates that there are no co-channel licensees on the offset frequencies 470.1500 and 473.1500 MHz. However, given that Bayonne proposes 11.25 kHz bandwidth on the offset frequencies, its bandwidth would overlap the bandwidth of several incumbent public safety licensees operating in wideband (20 kHz) mode on the adjacent frequencies.⁴⁵ One of these licensees, County of Somerset, New Jersey, provided a written letter of concurrence to Bayonne's proposed modification.⁴⁶ On September 10, 2009 and October 5, 2009, Bayonne provided interference analyses to demonstrate that it would not cause harmful interference to the remaining wideband licensees.⁴⁷ Specifically, Bayonne's analysis demonstrates that the proposed operations would cause less than 5% degradation to any remaining incumbent's service area, consistent with the Land Mobile Communications Council (LMCC) Consensus,⁴⁸ which the Wireless Telecommunications Bureau accepted in 1997.⁴⁹ Therefore, we agree with Bayonne that the proposed modification will not cause harmful interference to the incumbent public safety operations.⁵⁰

18. *Public Interest.* Bayonne argues that allowing it to use the requested frequencies is "in the public interest as it will allow otherwise vacant spectrum to be used by Bayonne to enhance its system availability to its users and eliminate or reduce the potential for congestion and 'busy' lockouts during

⁴⁴ See, e.g., Baldwin Fire District, New York, *Order*, 24 FCC Rcd 11857, 11868 ¶ 28 (PSHSB PD 2009).

⁴⁵ The following licensees operate at 20 kHz authorized bandwidth: on frequency 470.1375 MHz, the County of Somerset, New Jersey operates Stations WQBL360, WQBL367, and WPPB311. On frequencies 470.1625/473.1625 MHz, the Melville Fire District, New York operates Station WIG703, and Bergen operates Station WQDK989.

⁴⁶ See Shuler September Letter, attached Letter from Le Roy Gunzelman III, Director, Somerset County Office of Emergency Management, to Federal Communications Commission, dated Sept. 2, 2009.

⁴⁷ See Shuler September Letter; Shuler October Letter.

⁴⁸ See *id.*; see also Frequency Selection Procedures—12.5 kHz Offset Assignments at 470-512 MHz, attached to Letter dated Sept. 10, 1997, from Larry A. Miller, President, Land Mobile Communications Council, to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau (LMCC Consensus). The LMCC Consensus considers the relationship between a new 12.5 kHz bandwidth land mobile system and an existing 25 kHz bandwidth land mobile system, separated by 12.5 kHz. The degree of interference is calculated using the methods defined by the TIA TSB 88 document. If an applicant or an incumbent station is predicted to receive greater than five percent degradation in service area reliability, then the application shall not be certified by a frequency coordinator unless concurrence is obtained from all affected incumbents. See *id.*

⁴⁹ See Filing Freeze to be Lifted for Applications Under Part 90 for 12.5 kHz Offset Channels in the 421-430 and 470-512 MHz Bands, *Public Notice*, 13 FCC Rcd 5942 (WTB 1997).

⁵⁰ The LMCC Consensus also requires that the applicant's proposed service area may not receive more than 5% degradation from incumbents. See *id.* In this regard, Bayonne's analysis predicts that Bergen's adjusted interfering contour would overlap more than 5% of Bayonne's service contour. See Shuler October Letter at 3. If the frequencies involved were Part 90 frequencies, Bayonne's application would not be certified by frequency coordinators per the LMCC Consensus. However, since these are not Part 90 frequencies, we exercise our discretion to accept Bayonne's application, given that Bergen has indicated its intention to transition to narrowband operations on its frequencies in the near term, which would remove the contour and bandwidth overlaps. See Bergen Withdrawal of Opposition.

critical peak periods.”⁵¹ Section 1 of the Act directs the Commission to promote the safety of life and property through radio communications.⁵² Thus, it is in the public interest to authorize, under the proper circumstance, public safety agencies access to frequencies that are needed to protect lives and property. The record in this proceeding reflects that Bayonne needs the additional spectrum to provide public safety communications. Bayonne’s request would augment the existing communications system, which, *inter alia*, promotes “interoperability between City agencies and also neighboring jurisdictions, permitting coordinated law enforcement and rescue efforts.”⁵³ Next, we note that the former WTB/PSCID previously found that it was in the public interest to authorize Bayonne to operate its public safety radio system on similar Part 22 spectrum.⁵⁴ Finally, we agree with APCO that notwithstanding the availability of 700 MHz band spectrum, the public interest would be served by granting Bayonne use of the requested frequency pair because that frequency pair, unlike any frequencies in the 700 MHz band, is compatible with Bayonne’s existing system operating in the 470-512 MHz band.⁵⁵ We therefore conclude that granting the application is consistent with the public interest.

19. *Section 20.9(a)(6)*. This rule presumes that paging frequencies will be treated as common carriage services and regulated as commercial mobile radio service.⁵⁶ Because we find above that it is in the public interest to allow Bayonne to use frequencies 470.1500 and 473.1500 MHz for public safety purposes, we conclude that the underlying purpose of Section 20.9(a)(6) would not be served by its application to the present case. Accordingly, Bayonne’s request for relief is warranted because it satisfies the first prong of the Section 1.925 waiver standard.

20. *Section 22.623(b)*. We also find that Bayonne requires a waiver of Section 22.623(b) in order to operate on the requested frequencies.⁵⁷ This rule specifies system configuration requirements for paging control channels assigned pursuant to Part 22. These requirements include that the “channels may be assigned only individually (unpaired)” and that “[f]ixed relay transmitters are not authorized.”⁵⁸ Bayonne’s proposal includes pairing two frequencies, and the City would not be operating paging control channels on the requested frequencies. Because we find that it is in the public interest to allow Bayonne to use the requested frequencies for public safety purposes, we conclude that the underlying purpose of Section 22.623(b) would not be served or would be frustrated by application to the present case.

21. Lastly, in concluding that granting waiver relief to Bayonne is consistent with the public interest, we also observe that the Commission has begun examining ways to repurpose TV bands, such as the 470-512 MHz band,⁵⁹ for flexible use, including commercial mobile broadband. For instance, the National Broadband Plan has recommended that the Commission consider freeing up spectrum for

⁵¹ Waiver Request at 8-9.

⁵² 47 U.S.C. § 151.

⁵³ Waiver Request at 3.

⁵⁴ *See Seven Public Safety Agencies Order*, 19 FCC Rcd at 15363 ¶ 18.

⁵⁵ *See generally* APCO Comments.

⁵⁶ *See* 47 C.F.R. § 20.9(a)(6).

⁵⁷ *See* 47 C.F.R. § 22.623(b).

⁵⁸ *See id.*

⁵⁹ The 470-512 MHz band segment is one of five bands currently allocated principally to broadcast television under Part 73 of the rules. *See* 47 C.F.R. Part 73. Specifically, the 470-512 MHz band is allocated for fixed and land mobile services on a co-primary basis with broadcasting. *See* 47 C.F.R. § 2.106, footnote NG66.

commercial broadband use by using such mechanisms as voluntary incentive auctions,⁶⁰ and the Commission has taken its first steps toward this possibility with allocation proposals that would accommodate such use.⁶¹ While, at this time, we conclude that granting Bayonne's waiver relief will not compromise the Commission's ability to act (and flexibility in acting) on the recommendations of the National Broadband Plan and related initiatives for repurposing part of the TV bands for flexible use, we note that our consideration of the public interest in analyzing waiver requests on a case-by-case basis requires that we carefully consider any action that would disrupt or hamper the Commission's ability to identify and maximize the use of available spectrum. As the Commission takes steps to further broadband spectrum initiatives, it is likely that additional waiver requests for public safety use of spectrum currently allocated for the TV broadcast service will have different and more significant effects on Commission plans for this spectrum, and that it will accordingly become much more difficult to conclude that such waivers would, on the whole, serve the public interest. We therefore strongly urge public safety entities contemplating future waivers for TV and other non-public safety spectrum to consider use of the 700 MHz band to promote such goals as nationwide interoperability, consistent with the public interest.

IV. CONCLUSION

22. Based on the foregoing, we conclude that, although Bayonne has not made the requisite showing under Section 337(c) of the Act for a waiver of the Commission's rules, it has made a sufficient showing for granting its requested waiver under the first prong of Section 1.925 of the Commission's rules. We therefore grant Bayonne a waiver of Sections 20.9(a)(6), 22.621, 22.623(b), and 22.651 to permit Bayonne to modify its existing public safety communications system and use the frequencies 470.1500 and 473.1500 MHz, which are offset between Part 22 frequencies in the 470-512 MHz band.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED pursuant to Section 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), that the Request for Waiver, as amended, associated with File No. 0003074060 filed by the City of Bayonne, New Jersey, on June 18, 2007, as amended, IS DENIED to the extent that the City of Bayonne seeks relief under Section 337(c) of the Act.

24. IT IS FURTHER ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, that the Request for Waiver associated with the File No. 0003074060 filed by the City of Bayonne, New Jersey, on June 18, 2007, as amended, IS GRANTED, to the extent indicated herein.

25. IT IS FURTHER ORDERED that File No. 0003074060 SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

⁶⁰ See FED. COMMUNICATIONS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 88-93 (2010).

⁶¹ See Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, ET Docket No. 10-235, *Notice of Proposed Rulemaking*, 25 FCC Rcd 16498 (2010) (proposing, *inter alia*, to expand allocations for primary operations in TV bands to include fixed and mobile services, as one of the "preliminary steps to enable the repurposing of a portion of the UHF and VHF frequency bands that are currently used by the broadcast television service, which in later actions we expect to make available for flexible use by fixed and mobile wireless communications services, including mobile broadband.").

26. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191 and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau